Filed 8/31/06 In re K.F. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re K.F., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. JESSICA F., Defendant and Appellant.	E039618 (Super.Ct.No. RIJ107973) OPINION

APPEAL from the Superior Court of Riverside County. Robert Padia, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part; reversed in part with directions.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Joe S. Rank, County Counsel, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Konrad S. Lee, under appointment by the Court of Appeal, for Minor.

Jessica F. (mother) challenges the juvenile court's order terminating her parental rights to her son, K.F., pursuant to Welfare and Institutions Code[1] section 366.26. She contends reversal of the order is required due to noncompliance by the Riverside County Department of Public Social Services (DPSS) with the Indian Child Welfare Act (ICWA) and/or failure of the juvenile court to apply the "benefit exception to adoption" set forth in subdivision (c)(1)(A) of section 366.26. While we find no merit to mother's latter argument, we agree that remand is necessary to ascertain whether K.F. is an Indian child for purposes of the ICWA.

FACTUAL AND PROCEDURAL BACKGROUND

The underlying petition filed in May 2004 alleged, under section 300, subdivision (b), that K.F.'s parents engaged in "acts of domestic violence" in K.F.'s presence; that mother had a history of drug use, alcohol abuse and criminal activity; and that mother failed to take steps to protect herself and her son from further acts of domestic violence. K.F., then four months old, was detained and placed in emergency shelter care.

In the report prepared for the detention hearing, the social worker acknowledged the possibility that ICWA applied. The report further indicates that on May 19, 2004,

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[1] All further statutory references will be to the Welfare and Institutions Code unless otherwise indicated.

[footnote continued on next page]

notices were mailed by certified mail to the Bureau of Indian Affairs (BIA), the Eastern Band of Cherokee Indians, and the Cherokee Nation of Oklahoma. However, neither the record on appeal nor the superior court file contains copies of the notices or the receipts for certified mail.[2]

At the detention hearing, the court ordered reunification services and frequent, liberal visitation for both parents.

In her jurisdiction/disposition report, the social worker acknowledged that mother, on June 3, 2004, had denied that K.F. "was of Native American heritage or had any tribal linkage." Citing the detention report, however, she indicated that K.F. *may* be affiliated with the Cherokee tribe and that ICWA "does or may apply."

The social worker concluded that placement of K.F. with mother would be contrary to his safety due to her history of drug use and a positive test for a prescribed medication. It was her recommendation, however, that once mother became sober, her son should be placed with her on family maintenance status.

An addendum report indicated that mother tested positive for methamphetamine on June 22, 2004. The report also indicated that DPSS received a letter from the United Keetowah Band of Cherokee Indians in Oklahoma indicating "there is no evidence that

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[footnote continued from previous page]

[2] It is interesting to note that since the inception of the case, at least five different social workers were involved. Perhaps this lack of continuity explains why the notices were never filed.

[K.F.] is a descendant from anyone on the Keetowah Roll." Thus, there would be no intervention on its behalf.

Another addendum report indicated that mother did not show up for a drug test, did not enroll in a drug diversion program, and failed to attend a scheduled visit with K.F. The social worker concluded that mother had a drug addiction problem and needed treatment intervention prior to consideration of having her son returned to her.

At the jurisdiction hearing on August 12, 2004, the court found that continued placement outside the home was appropriate and ordered both parents to continue to receive reunification services for not to exceed six months. Also, both parents were to have frequent and liberal visitation.

The six-month review hearing was eventually held on May 2, 2005, after several continuances. DPSS recommended terminating reunification services for mother, even though the social worker opined that mother, "for the first time is starting to assume responsibility for her actions." In an earlier report, the social worker stated that mother "engages [K.F.] and interacts with him appropriately" during visits.

At the May 2, 2005, hearing, the court determined that mother's progress had been "adequate but incomplete," and provided for services to continue. A 12-month review hearing was scheduled for July 6, 2005.

According to the social worker's 12-month review report, mother had previously denied that K.F. "was of Native American heritage or had any tribal affiliation." At this time, mother was attending the Mariposa drug program and had had four negative drug

tests. However, on June 3, 2005, she tested positive for amphetamines. Meanwhile, she continued to have positive visits with K.F.

At the hearing on July 6, 2005, the court terminated reunification services. Mother was advised of her right to file a writ petition. No petition was filed.

A permanency hearing originally scheduled for November 3, 2005, was continued to December 19, 2005, and proceeded as scheduled. Over mother's objection, the court granted de facto parent status to K.F.'s prospective adoptive parents, who had been caring for him since May 2005.

Mother testified that she has two-hour visits with K.F. every third Wednesday, which are monitored by the foster mother. In response to an inquiry as to whether there had been any incidents during the visits between her and the foster mother, she stated: "My only concerns were, you know, that I requested time alone with my son. It's in a room that ha[s] French door windows. The staff can see outside. As far as being supervised, it was always allowed . . . before when he was in the care of the previous family. I just wanted to spend the time alone with my son. I only get two hours once every third Wednesday. It's not a lot of time. I didn't want to be interrupted."

In response to an inquiry as to how she would describe her bond with her son, she said: "I feel I miss him a lot. I feel that I'm still connected with him because I'm aware of his age, the kind of stages he's going through at that age. I have a son who is ten. I know what that's like. I try to contact people, ask how he's doing, you know, this or that. I don't get a lot of response. I'm not -- you know, I can't really communicate with him."

She noted that K.F. had never been able to call her "mommy." However, when she sees him at visits, he runs to her and gives her big hugs. Sometimes he visits with his older brother, Nicholas. Adding that she would like the opportunity to be a mother, she stated. "He was lucky to be born to a mother who wants him and cares for him, wishes him to be in her life."

During closing argument, mother's counsel asked the court not to terminate parental rights, but rather, to provide for a legal guardianship.

The court found that it was likely the minor would be adopted, and after finding that it would not be detrimental to terminate parental rights in that none of the exceptions applied, the court terminated parental rights.

DISCUSSION

A. Noncompliance with the ICWA's notice requirements mandates reversal of the order terminating parental rights.

Mother asserts ICWA noncompliance for failure of DPSS to file copies of the notices mailed to the BIA and the two Cherokee tribes with the juvenile court, and the corresponding return receipts, and on that basis contends reversal of the order terminating her parental rights is mandated. In response, DPSS asserts it is "somewhat perplexed by [mother's] ICWA argument since the record reflects that she denied [K.F.] had any Native American ancestry from nearly the inception of this case. Her statement was included in the Jurisdiction/Disposition report [] and repeated in subsequent reports [] and the record does not reflect that [she] ever refuted this representation."

While we appreciate the position taken by DPSS, out of an excess of caution we will reverse the order terminating parental rights and remand the matter for the purpose of determining the applicability of the ICWA and, in the event it is determined that the ICWA does apply, to ensure proper notice as required by law. Indeed, because the failure to give proper notice forecloses participation by interested Indian tribes, ICWA notice requirements are strictly construed and strict compliance is required. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 474-475.)

The purpose of the ICWA is, of course, to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families." (25 U.S.C. § 1902; *In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174.) "The ICWA presumes it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 469.) The provisions of the ICWA, which are said to be the highest standard of protection for Indian children, apply to juvenile dependency proceedings in this state, including proceedings to terminate parental rights. (*In re Junious M.* (1983) 144 Cal.App.3d 786, 796 (*Junious M.*).)

For purposes of the ICWA, an Indian child is "[a child] who is . . . either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); Cal. Rules of

Court,[3] rule 1439(a)(1)(A) & (B).) Interpreted to mean only "federally recognized tribes," the term "Indian tribe" is defined as, "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary [of Interior] because of their status as Indians . . . ." (25 U.S.C. § 1903(8).)

Among other things, the ICWA requires proper notice before the juvenile court may terminate parental rights to an Indian child. Where the court knows or has reason to know that an Indian child is involved, the agency is required to notify the child's Indian tribe, or if the tribe is unknown, the BIA, of the pending proceedings and the tribe's right to intervene. (25 U.S.C. § 1912(a); *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1265.) The Indian status of the child need not be certain in order to trigger the notice requirement. (*In re Jonathan D.* (2001) 92 Cal.App.4th 105, 110.) In all such circumstances, the court must seek verification of the child's status from either the child's tribe or the BIA. Whether the minor actually is an Indian child is an issue for one or the other of those entities to determine. (*Junious M.*, *supra*, 144 Cal.App.3d at pp. 792, 794.)

The courts of this state have declared this notice requirement to be a key component of the ICWA. The purposes of the ICWA cannot be fulfilled unless proper notice is given to either the identified Indian tribe or the BIA. (*In re C.D.* (2003) 110 Cal.App.4th 214, 224.) Notice, as prescribed by the ICWA, ensures that "the tribe will

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[3] All further rule references will be to the California Rules of Court unless otherwise indicated.

be afforded the opportunity to assert its rights under the Act irrespective of the position of the parents, Indian custodian or state agencies." (*In re Kahlen W*. (1991) 233 Cal.App.3d 1414, 1421.) Furthermore, the ICWA "unequivocally" requires that notice to the Indian child's tribe include both actual notice of the juvenile dependency proceedings, and notice to the tribe of its right to intervene. (*Id*. at p. 1422.) A tribe's mere "awareness" of the existence of a dependency proceeding is not sufficient notice under the ICWA. (*Ibid*.)

Moreover, [n]otice is meaningless if no information or insufficient information is presented to the tribe to make that determination. [Citation.]" (*In re Louis S*. (2004) 117 Cal.App.4th 622, 630.) The notice must include all required information, including the child's name, date of birth, and place of birth; the names and addresses of the child's parents, grandparents, and great-grandparents, along with dates of birth or death and/or other identifying information. A copy of the dependency petition must also be provided. (*Ibid*.) It is the agency's responsibility to obtain as much information as possible about the child's potential Indian background and to provide that information to the relevant tribe or, if the name of the tribe is not known, to the BIA. (*Ibid*.) Failure to provide notice in a manner consistent with the ICWA mandates reversal. (*Adoption of Lindsay C.* (1991) 229 Cal.App.3d 404, 416; *Junious M.*, *supra*, 144 Cal.App.3d at p. 796.)

"The ICWA confers on tribes the right to [make the conclusive determination if the child is an Indian child and the right to] intervene at any point in state court dependency proceedings." (*In re Dwayne P*. (2002) 103 Cal.App.4th 247, 253 (*Dwayne*

P.).) However, the tribe's right to intervene in the proceedings is meaningless if the tribe has not received notice of the pending action. (*Ibid*.)

Rule 1439 provides that the court and the agency "have an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child." (Rule 1439(d).) Rule 1439 also provides, "if . . . the court has reason to know the child may be an Indian child, the court must proceed as if the child is an Indian child . . . ." (Rule 1439(e).) It further provides that the court has reason to know the child may be an Indian child if, among other things, a party "informs the court or the . . . welfare agency or . . . provides information suggesting that the child is an Indian child." (Rule 1439(d)(4)(A).)

"The circumstances under which a juvenile court has reason to believe that a child is an Indian child include, but are not limited to, the following: '(i) Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child. [¶] (ii) Any public or state-licensed agency involved in child protection services or family support has discovered information which suggests that the child is an Indian child. [¶] (iii) The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child. [¶] (iv) The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community. [¶] (v) An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.' (Guidelines for State Courts; Indian Child Custody Proceedings (44

Fed.Reg. 67584, 67586 (Nov. 26, 1979)) . . . ; rule 1439(d)(2).)" (*In re O.K.* (2003) 106 Cal.App.4th 152, 156.)

Nevertheless, the courts of this state have held that a duty to give notice can arise even in the absence of evidence that the child or a parent is a tribe member. (See *In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1406-1407; *Dwayne P.*, *supra*, 103 Cal.App.4th at p. 254; *In re Kahlen W.*, *supra*, 233 Cal.App.3d at p. 1425.) Their reasoning is essentially twofold. First, a parent legitimately may not know if he or she is a tribe member. (*Dwayne P.*, at p. 257; *In re Kahlen W.*, at p. 1425.) " 'Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership. [Citation.]' [Citation.]" (*Dwayne P.*, at p. 255, quoting *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1300.) Second, each tribe has the sole authority to determine its own membership. (Rule 1439(g); *Dwayne P.*, at p. 255.) Indeed, one of the purposes of giving notice is to allow the tribe to determine whether the child is, in fact, an Indian child. (*Id.* at pp. 254-255; *In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) Thus, there is a concern lest the trial court usurp the tribe's authority.

On the record before us, we discern nothing which indicates that K.F. is or may be an Indian child for purposes of the ICWA so as to require notice. Nor is there anything in the record to substantiate the notation in the detention report that the ICWA *may* be applicable. Nonetheless, we find persuasive mother's contention that "[i]t is not reasonable to assume that [the social worker] sent notices to four separate entities on a

whim. Instead, the only logical explanation for [her] action is that at the time she prepared her detention report she had some information that led her to believe [K.F.] may have Cherokee Indian heritage and therefore, ICWA 'does or may apply' to this case."

Moreover, contrary to DPSS's assertion {RB 3}, we may not necessarily presume that K.F.'s *father* had no Native American heritage. Indeed, under the ICWA, a non-Indian parent has standing to assert noncompliance with the provisions of the ICWA. (*In re Daniel M*. (2003) 110 Cal.App.4th 703, 707.) Although the record reflects that K.F.'s father had "not made himself available to [DPSS] to discuss the possibility of Indian heritage," there is also nothing to indicate that he was asked about his Indian ancestry on the occasions when he visited the child in a social worker's presence. For this reason, we cannot be certain as to the source of the information upon which the social worker relied in making a decision to mail the notices. And, in the absence of those notices, we are unable to ascertain if they complied with the ICWA. Accordingly, remand is the only viable alternative.

B. Mother has failed to establish the juvenile court erred in not applying the section 366.26, subdivision (c)(1)(A) benefit exception.

Pointing to what she describes as a "close and bonded relationship with [K.F.] since his birth," which she has maintained despite the "substantial obstructions" imposed by her son's prospective adoptive family, mother contends the benefit to continuing that relationship outweighed the need to terminate parental rights. We disagree.

Section 366.26, subdivision (c)(1), provides for the termination of parental rights if family reunification services have been terminated and the juvenile court finds by clear and convincing evidence that the child is likely to be adopted. Once reunification services have been terminated, " '[f]amily preservation ceases to be of overriding concern . . . the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability.' [Citation.]" (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) "Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.)

Although the statutory preference is in favor of adoption, section 366.26 allows certain exceptions that may preclude termination of parental rights, if the juvenile court finds "a compelling reason for determining that termination would be detrimental to the child . . . . " (§ 366.26, subd. (c)(1).) The exception relevant here provides as follows: "The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) It is the parent's burden to show that these exceptional circumstances apply. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

We review the juvenile court's ruling on whether an exception applies to termination of parental rights pursuant to section 366.26 for substantial evidence. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Under this standard, an appellate court must affirm the juvenile court's order if there is evidence that is reasonable, credible, and of solid value to support the order (*In*

re Christina A. (1989) 213 Cal.App.3d 1073, 1080), and the evidence must be considered "in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference, and resolving all conflicts in support of the order." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 570.)

However, some courts have applied the abuse of discretion standard. (See, e.g., *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [applying parental benefit exception is a "quintessentially discretionary determination"].) The standards are not really all that different, however, and in either event we affirm. "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only " 'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . . " ' [Citations.]" (*Ibid*.)

For the exception to apply, the parent must have maintained regular visitation with the child, and the juvenile court must determine that the parent/child relationship "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To overcome the benefits

associated with a stable, adoptive family, the parent seeking to invoke the section 366.26, subdivision (c)(1)(A) exception must prove that severing the relationship will cause not merely *some* harm, but *substantial* harm to the child. (*In re Brittany C*. (1999) 76 Cal.App.4th 847, 853.) Similarly, "the exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1348; italics added.)

On the record before us, we cannot say that mother maintained regular visitation with K.F. Early in the case, she consistently missed visits. Later, the visits were curtailed because " 'she has too many things to do and cannot handle everything all at once.' " Even the social worker's final report recommended that "[v]isitation should be limited or should be left up to the discretion of the prospective adoptive parents regarding [K.F.]. The mother at times will cause chaos at the agency in front of the child during her visits. She will insist on only having unsupervised visits with the child and will often times make comments in front of the child and the caretaker that the child is going to come home to her soon." We reject mother's position that "[h]er lack of regular contact with [K.F.] was not a factor over which [she] had control." We have no reason to believe that it was anything other than her conduct during visits which necessitated the reduction in their frequency. Accordingly, because there is no evidence that mother maintained regular visitation with K.F., there is no need to address the second prong of the statute.

However, even if mother could satisfy the first prong of the statute, there clearly is no evidence that maintaining the mother-son relationship outweighs the benefit to the child of adoption in a permanent home. In support of her position that she and K.F. were strongly bonded, mother points to various statements made in the social worker's reports. For example, in the jurisdiction/disposition report, the social worker noted that mother was "very bonded with her son." Seven months later, the social worker wrote that mother "engages [K.F.] and interacts with him appropriately." Five months later, the social worker described mother's positive visits with K.F. and said that mother "love[d] [K.F.] very much." Additionally, mother testified that K.F. runs to her and hugs her when she visits.

That mother loves her son, and that K.F. has affection for mother, is clear from the record. But this, without more, is not evidence of a bonded relationship

Mother relies largely on *In re Amber M*. (2002) 103 Cal.App.4th 681, a case in which an order terminating a mother's parental rights was reversed pursuant to section 366.26, subdivision (c)(1)(A). *Amber M*. is, however, distinguishable in a very important aspect. There, the court had before it a report from a psychologist who had conducted a two-hour bonding study. The psychologist concluded that Amber and her mother shared a "primary attachment" and a "primary maternal relationship" and that it "could be" detrimental to sever the relationship. Amber's therapist likewise believed that they had a strong bond and it was important for the relationship to continue. Testimony from a court-appointed special advocate (CASA) indicated that Amber's brother loved and

missed his mother and had difficulty separating from her, but the CASA believed the children should remain with their grandparents because their mother was not ready to care for them. Thus, said the court, "The common theme running through the evidence from the bonding study psychologist, the therapists, and the CASA is a beneficial parental relationship that clearly outweighs the benefit of adoption." (*In re Amber M.*, at p. 690.)

In contrast, no such evidence was presented here. Rather, the evidence presented showed that mother had not maintained regular visitation and that K.F. would not benefit from continuing the relationship. Likewise, there was no evidence that K.F. would be harmed in any way—much less "greatly harmed"—by terminating the relationship.

In addition, there was little evidence that K.F. viewed mother as a parent. Rather, mother was, at most, only a familiar playmate for K.F., who she candidly admitted would not even refer to her as "mommy." To meet the burden of proof for the section 366.26, subdivision (c)(1)(A) exception, the parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child . . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The parent must show that he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*Ibid.; In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.) Moreover, even if a child loves his or her

parents, the court may nonetheless terminate parental rights if doing so is in the child's best interests. (§ 366.26, subd. (h).)

What the evidence did show was that K.F. had adapted well, was thriving in his new home, and was bonding with his prospective adoptive family. Accordingly, the juvenile court did not err in finding that K.F.'s need for permanency outweighed any benefit which could be derived from maintaining his biological connection with mother, and in concluding that the section 366.26, subdivision (c)(1)(A) exception did not preclude termination of parental rights.

DISPOSITION

Based upon the foregoing, the order terminating parental rights is reversed and the matter is remanded to the juvenile court for a determination, in accordance with the views expressed herein, as to whether the ICWA applies to the minor child. If so, the court shall direct DPSS to comply with the ICWA requirements. After the appropriate Indian entities receive proper notice under the ICWA, if it is determined that the minor child is not an Indian child and the ICWA does not apply, the juvenile court shall reinstate its previous order terminating parental rights.

Alternatively, in the event it is determined that the minor child is an Indian child in accordance with the ICWA, the juvenile court is directed to hold further proceedings. If, during the course of those proceedings, it determines that the ICWA does not otherwise apply, it must reinstate the original order terminating parental rights.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ MILLER
J.

We concur:

/s/ RICHLI
Acting P. J.

/s/ GAUT
J.